IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants.	)	
_____	)	

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO JOIN THE CHEROKEE NATION AS AN REQUIRED PARTY OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON LACK OF STANDING

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INTRODUCTION

In this extraordinarily broad action, Plaintiffs Miles Tolbert and W.A. Drew Edmondson, purportedly suing on behalf of the State of Oklahoma ("Oklahoma" or the "State") seek monetary damages and injunctive relief for alleged environmental injuries to the *entire* million-acre Illinois River Watershed ("IRW" or "watershed"). Plaintiffs seek recovery under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*; the Solid Waste Disposal Act (commonly known as "RCRA"), 42 U.S.C. § 6972 *et seq.*; federal common law; Oklahoma law regarding nuisance, trespass, and unjust enrichment; and Oklahoma's comprehensive environmental and agricultural regulatory scheme.

Oklahoma asserts blanket powers over the IRW as the alleged trustee of natural resources, as a sovereign exercising its police powers, and as a titleholder to the lands and other natural resources. For example, in the hearing on the State's Motion for a Preliminary Injunction, Plaintiff Miles Tolbert claimed that he (as Oklahoma's designee) is the trustee of all natural resources within the IRW to the exclusion of Indian Tribes such as the Cherokee Nation. *See* Ex. 1, Transcript of PI hearing, 153:9 – 154:5. Each of Plaintiffs' claims is based on similar allegations of ownership or sovereign trusteeship. Indeed, Plaintiffs' Second Amended Complaint ("SAC" or "Complaint") alleges that:

> The State of Oklahoma is a sovereign state of the United States. The State of Oklahoma, without limitation, has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams. Additionally, the State of Oklahoma holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public.

SAC, Dkt. #1215, ¶ 5.

Contrary to this assertion, the Cherokee Nation's claim that it is the true sovereign owner and trustee of the IRW's natural resources within the political boundaries of Oklahoma is well

known to the State. Plaintiff Miles Tolbert alluded to the Cherokee Nation's ongoing claim of title and trusteeship in his recent testimony, but dismissed the Cherokee Nation's rights. Ex. 1 at 153:21 – 154:4 ("I think it's fair to say that there are some members of the Cherokee Nation who think they have a claim to the water" [but] "I think the State has ownership"). The Cherokee Nation's claim is not speculative and Mr. Tolbert's cavalier dismissal of the rights of the Cherokee Nation is improper. As discussed in detail below, the federal courts have repeatedly rejected Oklahoma's assertion that it owns or holds in trust natural resources that the United States gave to Native Americans by treaty. *See, e.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970); *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980). Nevertheless, Oklahoma's allegations in this case ignore the interests of the Cherokee Nation.

By bringing this action in derogation of the rights of the Cherokee Nation, the State has placed Defendants in the center of a two-century-old conflict over who owns and controls the lands, waters and biota in the IRW and who is entitled to sue based on alleged injuries to those lands, waters and biota. Adjudication of these claims in the absence of the Cherokee Nation will impose state control over tribal lands, waters and biota in clear violation of the political integrity, economic security and welfare of the Cherokee Nation. Moreover, because the Cherokee Nation will not be bound by *res judicata* and collateral estoppel in this case, allowing these claims to proceed in the absence of the Cherokee Nation could expose Defendants to multiple and potentially inconsistent judgments as well as waste limited judicial resources on an incomplete resolution of the State's claims. Accordingly, pursuant to Rule 19 of the Federal Rules of Civil Procedure, Defendants seek dismissal of the State's Complaint for nonjoinder of the Cherokee

Nation, a federally-recognized Tribe which enjoys tribal immunity from suit and tribal authority to govern its own resources.

In the event this case is not dismissed pursuant to Rule 19 (whether because the Court determines the Cherokee Nation's participation is not required or because the Nation consents to being joined), Defendants move for judgment as a matter of law based on the fact that Oklahoma lacks standing to pursue claims for damages to natural resources that are owned or held in trust by the Cherokee Nation. The State cannot avoid resolution of the issue of who owns or holds in trust the natural resources that are it issue in this lawsuit. If the State does not own or hold those resources in trust, then it lacks standing to assert claims under theories of state nuisance, federal nuisance, CERCLA, trespass, or unjust enrichment. Those claims must be dismissed even if the action proceeds with the Cherokee Nation as the plaintiff.

I. BACKGROUND

A. The State Claims At Issue

The Illinois River system is comprised of the Illinois River, numerous streams, and several major tributaries, including Caney Creek, Flint Creek and the Baron Fork River. These streams flow to Lake Tenkiller reservoir before emptying into the Arkansas River. *See* SAC ¶¶ 22-25. Approximately one-half of the watershed's 1,069,530 acres are located in Northeast Oklahoma. The IRW encompasses parts of Cherokee, Adair, Delaware and Sequoyah counties, including Tahlequah, Oklahoma, capital city of the Cherokee Nation. Ex. 2 (IRW map).

The State filed its Complaint on July 16, 2005. The State alleges that Defendants are out-of-state corporations engaged in or responsible for poultry growing operations within the watershed. *See* SAC ¶¶ 6-19. At bottom, the State contends that Defendants, "by virtue of their improper poultry waste disposal practices, are responsible for … pollution of, as well as the degradation of, impairment of and injury to the IRW, including the biota, lands, waters and

sediment therein." *Id.* ¶ 30. The State seeks damages and injunctive relief.

To sustain its claims, the State asserts that it "has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams" and "holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public." *Id.* ¶ 5; *see also id.* ¶ 78 ("The Oklahoma Secretary of the Environment, acting on behalf of the State of Oklahoma, is the designated CERCLA trustee for 'natural resources' in, belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the State of Oklahoma."). According to the State,

> [a]s a result of the release of hazardous substances by … Defendants into the IRW, including the lands, waters and sediment therein, there has been injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma.

Id. ¶ 84; *see also id.* ¶ 85 ("This injury to, destruction of, and loss of natural resources in the IRW, including the land, fish, wildlife, biota, air, water, ground water, drinking water supplies and all other such resources therein, for which the Oklahoma Secretary of the Environment is trustee on behalf of the State of Oklahoma is continuing.").

B. The Tribal Rights At Issue

The State's Complaint overlooks the well-established fact that the federal government transferred all of the water and other natural resources within the Oklahoma portion of the IRW to the Cherokee Nation before Oklahoma became a state, and those natural resources remain the exclusive property of the Cherokee Nation today. *See* Ex. 3-6 (Cherokee Nation maps).

The Cherokee Nation's claim to the lands, waters, and other natural resources of the IRW stems from treaties the Cherokee were compelled to accept in order to resolve a national crisis. In the early 1800s, the Cherokee largely lived in the South, including Georgia. Due to pressure

from white citizens who wanted the Cherokee's lands and other natural resources, state officials in these areas engaged in a campaign to harass the Cherokee and drive them out of their homes. See Cohen, *supra*, at § 1.03[4][a]; Robert J. Conley, *The Cherokee Nation: A History*, 132-34, 141 (2005). Among other actions, the State of Georgia asserted its state laws over the lands and natural resources that belonged to the Cherokee. Cohen, *supra*, at § 1.03[4][a], p. 45-51; *Choctaw Nation*, 397 U.S. at 622-28. The Supreme Court vindicated the right of the Cherokee, rejecting the state's attempt to supplant the tribe in governing tribal resources. *Worcester v. Georgia*, 31 U.S. 515, 561-62 (1832). But the federal government and state officials refused to enforce the Supreme Court's judgment and instead compelled the Cherokee to enter into treaties exchanging their lands east of the Mississippi River for lands in what is now Oklahoma. *See* Cohen, *supra* §§ 1.03[4][a]; 4.07[1][a] (describing (1) the federal government's efforts to voluntarily remove the Cherokee; (2) state government harassment of the Cherokees; and (3) the Cherokees' forcible removal to Oklahoma in 1838—popularly known as the Trail of Tears).

The Cherokee were not alone. The Five Civilized Tribes, consisting of the Choctaw, Chickasaw, Creek, Cherokee and Seminole, were among the first removed to Oklahoma. *See id.*; Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333 (Treaty of Dancing Rabbit Creek); Treaty with the Seminole, May 9, 1832, 7 Stat. 368; Treaty with the Creek, Feb. 14, 1833, 7 Stat. 417; Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, 11 Stat. 573; Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 (Treaty of New Echota). As part of this removal, the United States promised the Cherokee sovereign, exclusive title and control over resources sufficient to form a separate homeland for their nation. The Cherokee Nation's lands, in what would later become Oklahoma, were described in the 1833 Treaty with the Cherokee as:

> commencing at a point on Arkansas river, where the eastern Choctaw boundary line strikes said river; and running thence with the western line

> of Arkansas Territory to the southwest corner of Missouri and thence with the western boundary line of Missouri until it crosses the waters of Neasho, generally called Grand river, thence due west, to a point from which a due south course will strike the present northwest corner of Arkansas Territory, thence continuing due south on and with the present boundary line on the west of said Territory, to the main branch of Arkansas river, thence down said river to its junction with the Canadian, and thence up, and between said rivers Arkansas and Canadian to a point at which a line, running north and south, from river to river, will give the aforesaid seven millions of acres, thus provided for and bounded.

Treaty with the Cherokee, Feb. 14, 1833, preamble, 7 Stat. 414. These boundaries were reaffirmed in later treaties between the U.S. and the Cherokee Nation.[1] *See*, *e.g.*, Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, art. 2, 5.

In 1833, the boundaries of the Arkansas Territory differed significantly from those of the State of Arkansas today. The Arkansas Territory was originally defined in 1819, *see* 3 Stat. 493-94, and subsequently reduced to an area bordered on the south by the Red River with a western border running north along the Arkansas River and up to the Southwestern corner of Missouri. Treaty with the Cherokee, May 6, 1828, 7 Stat. 311 (redefining the Arkansas Territory). Thus, the United States granted the Cherokee an area within what is now eastern Oklahoma, bounded by what is now the Arkansas state border to the east and the Arkansas River to the west. This area includes the entire portion of the IRW located within modern-day Oklahoma, as demonstrated by comparing the maps attached as Exhibits 3-5.[2]

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[1] Article I of the 1833 Treaty with the Cherokee provides an alternate description of the metes and bounds of Cherokee land. The two descriptions are not in conflict. The key boundary lines described in Article I are largely defined based on their relation to other Indian territories. 7 Stat. 411, 412. Both descriptions include the portion of the IRW within Oklahoma.

[2] While the language of the Treaty of 1833 clearly grants all of the Oklahoma portion of the IRW to the Cherokee Nation, any ambiguity in the description of the territory or in subsequent changes to Tribal rights must be resolved in favor of the Nation. The Supreme Court explained:

> About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important

Because the Cherokee were forced out by state efforts to regulate Cherokee lands, the federal government assured the Cherokee that they would be forever protected from attempts by state officials to control the Tribe's natural resources in Oklahoma. The federal government "guarantee[d] to them lasting and undisturbed possession" of the land described in the treaty. Cohen, *supra*, § 1.03[4][a], p. 46 & n.279 (quoting Office of Ind. Aff. Ann. Rep., S. Doc. No. 19-1 at 91 (1825)). The United States also "covenant[ed] and agree[d] that the lands ceded to the Cherokee nation … shall secure to the Cherokee nation the right … to make and carry into effect all such laws as they may deem necessary" to regulate their new lands. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, art. 5; *see also* Treaty with the Western Cherokee, May 6, 1828, preamble, 7 Stat. 311 (promising the Cherokee "a permanent home … which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever" free of the "jurisdiction of a Territory or State"). *See Choctaw Nation*, 397 U.S. at 622-28.

Subsequent treaties both added and removed land from the Cherokee Nation's possessions. *See* Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, art. 2 (providing an additional 800,000 acres of land in Oklahoma); Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799 (allotting acres to any Cherokee who elected to move to an extension of Cherokee

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> is the fact that these are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, *see, e.g.*, *Jones v. Meehan*, 175 U.S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor.

Choctaw Nation, 387 U.S. at 630-31; *see also Arizona v. California*, 373 U.S. 546 (1963); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564 (1908); Cohen, *supra* § 2.02 (discussing various canons of construction unique to Indian law that require treaties to be construed in favor of increased Tribal property rights).

land, and removing from the Cherokee certain lands in Kansas). However, these later treaties reaffirmed that the Cherokee possessed the area encompassing the entire IRW and repeated the promise that the Cherokee Nation would own and control its own natural resources in that area, without interference from territorial or state governments. *See* Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799, art. 5, 6, 26. For example, the federal government assured the Cherokee Nation that its lands "shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States." *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 67 Fed. Cl. 695, 696 (2005), *rev'd on other grounds*, 480 F.3d 1318 (Fed. Cir. 2007) (quoting Treaty with the Cherokee, Dec. 29, 1935, U.S.-Cherokee, art. VI, 7 Stat. 478, 480, 481). Thus, there is no question that territorial or state governments could never unilaterally assert any measure of jurisdiction, ownership or control over the lands and natural resources belonging to the Cherokee Nation. *See* Cohen, *supra* § 2.01[2] ("The field of Indian law has been centrally concerned with protecting Indian tribes from illegitimate assertions of state power over tribal affairs.").

C. As a Condition of Becoming a State, Oklahoma Expressly Disclaimed Any Rights to the IRW's Natural Resources

In 1889, the United States officially opened "unassigned lands" in what is now central Oklahoma for white settlement. *See* Appropriations Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 980, 1005; Pres. Procl. of Mar. 23, 1889, 26 Stat. 1544; *see also* Taiawagi Helton, *Indian Reserved Water Rights In The Dual-System State Of Oklahoma*, 33 Tulsa L.J. 979, 985 (1998). One year later, Congress created the Oklahoma Territory in what had been the western part of the original Indian Territory. *See* Act of May 2, 1890, ch. 182, §§ 1-28, 26 Stat. 81 (the 1890 Oklahoma Organic Act). Although a territorial government was formed, the Act expressly

preserved tribal authority and federal Indian jurisdiction in both Oklahoma and Indian Territories. *See* §§ 1, 12, 29-31; 26 Stat. at 81, 93.

In the late 1800's, tribal lands were "allotted" in a series of congressional acts. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 449, 341-42, 348-49, 354, 381). "Allotment" was a process whereby tribal lands, which were held in common, were divided into smaller portions and parceled out to tribal members as individualized holdings. *See* Cohen, *supra,* §§ 1.03[6][b]; 1.04; 4.07[1][c]. These holdings were sometimes held by individual Native Americans in fee, and sometimes in a restricted trust. *Id.* § 1.04. The lands of the Five Tribes were subjected to allotment beginning in 1893. *See* Appropriations Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645 (allotment under the Dawes Commission); Act of June 28, 1898, ch. 517, 30 Stat. 495 (the Curtis Act); Cohen, *supra,* § 4.07[1][c]. Although the allotment process resulted in the alienation of some tribal lands, substantial lands remain in restricted fee by the Tribes or individual tribal members.[3] As a consequence, Oklahoma is now a checkerboard of tribal and non-tribal lands. These tribal lands—although discontinuous and part of no formal reservation—continue to constitute Indian Country. *See Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. at 125; *Oklahoma Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

The Five Tribes Act of 1906 recognized that allotment was occurring, but ensured that tribal governments "hereby continued in full force and effect." Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137, sec 28, 148. Although subject to allotment, Congress maintained that

[3] Allotment came to an abrupt end in 1934 with the passage of the Indian Reorganization Act. *See* 48 Stat. 984, 25 U.S.C. §§ 461-79. Congress halted further allotments and extended

> the lands belonging to the [Five Tribes], upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs

Id. sec. 27. The Cherokee's waters, sediments and biota were not alienated in the allotment process. Accordingly, the Cherokee Nation today continues to hold sovereign authority over those natural resources to the exclusion of the State. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195-202 (1999); *Washington v. Washington Comm. Passenger Fishing Vessel Assn*., 443 U.S. 658, 690 (1979); *Choctaw Nation*, 397 U.S. at 622-31; *Arizona v. California*, 373 U.S. 546, 601 (1963); *Winters v. United States*, 207 U.S. 564, 577 (1908). The Cherokee Nation continues to unambiguously assert its ownership over the waters and other natural resources of the IRW. *See, e.*., Ex. 7.

The Oklahoma Enabling Act, which followed later in 1906, provided for admission to the Union of both the Oklahoma and Indian Territories together, as the State of Oklahoma. *See* Act of June 16, 1906, 34 Stat. 267. Oklahoma officially became a state in 1907, but renounced all right and title to Indian lands in exchange for statehood. *Id*. at 267-68; Okla. Const., Art. I, § 3 ("The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation . . . ."). The federal government expressly retained exclusive authority over Indian matters. *See* Presidential Procl. of Nov. 16, 1907, 35 Stat. 2160. As a result, within Oklahoma, "[t]ribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law." Cohen, *supra*, § 4.01[1][b].

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indefinitely the existing periods of trust applicable to already allotted (not yet fee patented) Indian lands. *See* 25 U.S.C. §§ 461, 462; Cohen, *supra*, § 1.04.

Despite Oklahoma's express, constitutional disclaimer of any right to the resources of Native Americans, Oklahoma's state government has frequently asserted ownership or trusteeship over lands and other natural resources rightfully belonging to Tribes. As a result, the federal courts have repeatedly clarified that Tribes continue to hold title to their lands and other natural resources to the exclusion of the State. These cases have specifically addressed the types of resources that are the subject of Oklahoma's Complaint (namely, water, streambeds, and associated soils, sediments, and biota) and have concluded that the State's claims of ownership or trusteeship over those resources are unfounded. *See, e.g.*, *Choctaw Nation*, 397 U.S. at 635 (finding that the Cherokee Nation, not the State of Oklahoma, holds title to streambeds encompassed within the lands Congress originally granted to the Nation); *Grand River Dam Auth.*, 363 U.S. at 1137-38 (denying a claim for compensation for the taking of water rights because the Cherokee Nation and not Oklahoma held title to the water under the above-mentioned treaties); *Brewer-Elliott Oil & Gas*, 260 U.S. at 87-88 (voiding oil and gas leases for a river bed, granted by Oklahoma, because the Cherokee and then Osage Tribes, not the State, held title to that land); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (striking down Oklahoma's attempt to regulate hunting and fishing in Indian Country). In rejecting Oklahoma's overreaching, the Supreme Court has continually upheld the Tribes' "inherent sovereign authority over their members and territories," *Citizen Bank Potawatomi Indian Tribe of Okla.*, 498 U.S. at 509, which, as explained below, includes the waters and other natural resources in the portion of the IRW within Oklahoma.

D. The Natural Resources Given to the Indian Tribes by Treaty Include the Waters, Streambeds, Sediments and Biota

There is no question that, when the United States granted the Cherokee Nation ownership of the Oklahoma portion of the IRW, the Nation also received ownership of the IRW's natural

resources, such as surface water, streambeds, groundwater, and biota. *Choctaw Nation*, 397 U.S. at 621-35. In *Winters*, 207 U.S. at 577, the Supreme Court confirmed that, when Congress granted lands to Indian Tribes, it impliedly reserved for the Tribes the waters that accompanied the granted lands. *See also Arizona*, 373 U.S. at 601 ("the United States did reserve the water rights for the Indians effective as of the time the Indian reservation was created"). This reservation of natural resources clearly encompasses "all water sources—groundwater basins, streams, lakes and springs—which arise on, border, traverse, underlie, or are encompassed within" the lands Congress originally granted to the Cherokee, including the entire Oklahoma portion of the IRW. Cohen, *supra*, § 19.03(2)(a). The reservation also includes the associated streambeds, soils, sediments, stream banks, and biota. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Choctaw Nation*, 397 U.S. at 621, 631-35; *Grand River Dam Auth.*, 363 U.S. at 234-35; *Brewer-Elliott*, 260 U.S. at 87-88; *Cheyenne-Arapaho Tribes of Okla.*, 618 F.2d at 669; *In re General Adjudication of All Rights to Use Water in the Gila River System & Source*, 989 P.2d 739, 748-49 (Ariz. 1999) (holding that reserved water rights include groundwater).[4]

As noted above, Congress included unusually strong language in the treaties with the Cherokee Nation, promising exclusive perpetual sovereignty over lands and resources sufficient to form a new nation. Because of these treaty provisions, the claims of the Cherokee Nation to natural resources such as waters, riverbeds, and biota is even stronger than the claims held by Indian Tribes generally. Cohen, *supra*, § 4.07[1][a] & n. 708. Indeed, the federal courts have

[4] For purposes of recognizing that Oklahoma is not the owner or trustee of natural resources within the IRW, it makes no difference whether the Tribes received their lands in fee or as a reservation. *See New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976); Cohen, *supra*, § 4.07[b][1]. It also makes no difference that the natural resources may be useful or necessary to non-Indians. There is no balancing of competing interests with regard to natural resources reserved for Indian reservations. *Cappaert*, 426 U.S. at 138, n. 4; *Arizona*, 373 U.S. at 597;

previously rejected Oklahoma's claims that it owns or holds in trust the waters, streambeds and associated sediments previously granted to Indian Tribes. In *United States v. Grand River Dam Authority*, the Supreme Court held that water rights to non-navigable streams in the territory granted to the Cherokee Nation did not pass to Oklahoma when the territory achieved statehood. 363 U.S. at 234-35. Similarly, in *Choctaw Nation v. Oklahoma*, the Tribes claimed to be, "since 1835[,] the absolute fee owner" of land below the mean high water level of rivers within their original reservations. 397 U.S. at 621. In rejecting Oklahoma's claims to the contrary, the Supreme Court noted that the reservations granted to the Tribes before Oklahoma existed encompassed rivers, and that it was within the United States' authority to "dispose of lands underlying navigable waters just as it can dispose of other public land." *Id.* at 631, 633. Indeed, the Supreme Court viewed it as inconceivable that, in conveying in "fee simple title . . . a vast tract of land through which" rivers wind their course, the United States would have excluded the banks and bed of those rivers, particularly when "the Indians were promised virtually complete sovereignty over their new lands." *Id.* at 634-35; *see also Brewer-Elliott Oil & Gas Co.*, 260 U.S. at 87-88 ("Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of [an Indian Tribe], there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title."). As with the Choctaw Indians, the Cherokees were promised, and continue to maintain, "virtually complete sovereignty over their . . . lands," *Choctaw Nation*, 397 U.S. at 621, including all of the waters, stream and river beds, and sediments of the IRW, to the exclusion of Oklahoma. *See also United Keetoowah Band*, 67 Fed. Cl. at 697 (noting that "[i]n

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United States v. Washington, 506 F. Supp. 187, 204-05 (W.D. Wash. 1980). Tribal ownership of

1970 the United States Supreme Court determined that the [1935] Treaty of New Echota conveyed title to all lands within its metes and bounds description, including the banks and bed of the Arkansas River, to the Cherokee Nation"); *Grand River Dam Auth*., 363 U.S. at 234.

In sum, the Cherokee Nation continues to own and to assert its authority over the lands and other natural resources granted by the treaties with the United States, including the natural resources of the IRW. *See* Const. of the Cherokee Nation, Art. I ("The boundary of the Cherokee Nation shall be that described in the treaty of 1833 between the United States and Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States"). Plaintiffs are aware of the Cherokee Nation's claims to the natural resources of the IRW.

II. ARGUMENT

This action must be dismissed because Oklahoma has failed to join the Cherokee Nation as a party. Rule 19 of the Federal Rules of Civil Procedure requires dismissal of an action where: (1) the plaintiff failed to join a required party; (2) joinder is not feasible; and (3) the non-joinder would result in significant prejudice.[5] *See Davis v. United States*, 343 F.3d 1282, 1288 (10th Cir. 2003), *cert denied*, 124 S. Ct. 2907 (June 28, 2004). In the alternative, should this Court find that the Cherokee Nation is not a required party or in the event Plaintiffs are permitted to join the Nation as a party, Oklahoma's claims must be dismissed because it lacks standing to pursue claims for injury to natural resources belonging to the Cherokee Nation.

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natural resources is superior to all other claims and interests.

[5] Until 2007, Rule 19 spoke of "necessary" and "indispensable" parties. The newly-revised rule replaced those words with "required" to avoid the suggestion that a party must be truly "indispensable" before a dismissal may be ordered. *Republic of Philippines v. Pimentel*, 128 S.Ct. 2180, 2184-85 (2008). This change is stylistic rather than substantive. *Id.* Accordingly, pre-2007 decisions on Rule 19 are cited and discussed herein.

A. The Cherokee Nation is a Required Party

Rule 19(a) sets forth three separate and alternative tests for determining whether a party is required. A party is required if: (1) "in the person's absence complete relief cannot be accorded among those already parties"; (2) the disposition in the litigation may "impair or impede" the absent party's interests; or (3) the parties already subject to the litigation have "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Fed. R. Civ. P. 19(a). Given the nature of the claims being pursued by the State in this action and the well-established interest of the Cherokee Nation in the natural resources of the IRW, the Cherokee Nation is clearly a required party in several respects.

1. The Cherokee Nation Has a Significant Interest in the IRW's Natural Resources That Will Be Impaired or Impeded by Its Absence

Because the Cherokee possess a legally protected interest in the IRW's lands, waters, and other natural resources, resolution of this lawsuit without the Cherokee Nation will plainly "impair or impede" the Nation's rights within the watershed. *See* Fed. R. Civ. P. 19(a)(2)(i).

As discussed above, the treaties with the Cherokee Nation granted ownership of all lands within the IRW. When the United States transferred the IRW to the Cherokee Nation, it was given for the purpose of creating a permanent and separate Indian homeland. Treaty of New Echota, Dec. 29, 1835, art. 5, 7 Stat. 478, 481. The Supreme Court has repeatedly held that such a grant impliedly reserves to the Tribe the natural resources associated with a sovereign, independent nation. *Arizona*, 373 U.S. at 601; *Winters*, 207 U.S. 564, 577 (1908). Accordingly, the grants to the Cherokee encompass all surface water in both navigable and nonnavigable streams within the IRW, groundwater, streambeds, biota, and any lands that are currently, or were historically, submerged. Thus, when Oklahoma came into existence, it did not assume trusteeship or control of the IRW's natural resources as successor to the United States because

the United States had already conveyed those resources to the Cherokee Nation. *Cappaert*, 426 U.S. at 138; *Choctaw Nation*, 397 U.S. at 621, 631-35; *Grand River Dam Auth.*, 363 U.S. at 234-35; *Brewer-Elliott Oil & Gas*, 260 U.S. at 87-88; *Cheyenne-Arapaho Tribes of Oklahoma*, 618 F.2d at 669. Indeed, the newly-formed State of Oklahoma disclaimed "all rights and title" to the IRW. Okla. Enabling Act, June 16, 1906 § 3 34 Stat. 267, 270.

However, the Court need not conclude on the merits that the Cherokee Nation has exclusive title and trusteeship of the IRW's natural resources to resolve the Rule 19 issue. While the Nation's ownership of the aforementioned natural resources is clear, any argument to the contrary is irrelevant for purposes of Rule 19. "Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'" *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999) (emphasis in original). In the Tenth Circuit, interests that are "fabricated" or "'patently frivolous'" cannot sustain a Rule 19 motion, but the claims of the Cherokee Nation are substantial. *Id.* at 958-59 (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)); *see also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001). Thus, Oklahoma's mere assertions of title cannot defeat the Cherokee Nation's interests for purposes of Rule 19. *Davis*, 192 F.3d at 958 ("Plaintiffs' narrow interpretation of the term 'legal protected interest' inappropriately presupposes Plaintiffs' success on the merits."). In fact, Plaintiffs' admission that the Cherokee Nation claims ownership of the IRW's natural resources, Ex. 1, 153:17-23,[6] is dispositive in establishing that the participation of the Cherokee Nation in this lawsuit is "required" under Rule 19.

[6] *See also* Ex. 7; Travis Snell, *Tribe Claims Water Storage on Lake Tenkiller, Corps Disagrees*, Cherokee Phoenix & Indian Advocate (June 2004) (reporting that the Cherokee Nation recently asserted ownership "to the waters of northeast Oklahoma," including Lake Tenkiller).

Since the Supreme Court's decision in *Choctaw Nation*, courts consistently have recognized the necessity of ensuring that Tribes are adequately represented in litigation involving lands and natural resources for which the Tribes hold or claim title. In fact, "[i]t is generally recognized that a party claiming title to property that is the subject of litigation has an 'interest' in that litigation." *United Keetoowah Band*, 67 Fed. Cl. at 700. The decision of the Court of Federal Claims in *United Keetoowah Band* is illustrative. In that case, the court dismissed a complaint filed by the United Keetoowah Band of Cherokee Indians ("Keetoowah Band") against the United States for the failure to join the Cherokee Nation as an indispensable party. The Keetoowah Band claimed interest in certain river beds and banks, and sought compensation from the United States for extinguishing the Keetoowah Band's claims to title, pursuant to 25 U.S.C. § 1779f(b)(1)(A). The Cherokee Nation asserted that it was an indispensable party "as the sole titleholder of all Riverbed lands" for which the Keetoowah Band claimed interest, and the Court of Claims dismissed the action. *United Keetoowah Band*, 67 Fed. Cl. at 699. While the Federal Circuit reversed, it did so only on the ground that the particular claims in question did not actually implicate the Indian Tribes' interest in the riverbeds, as Congress had passed a special law for that case to extinguish those interests and provided compensation to the Tribes. *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States*, 480 F.3d 1318, 1325-26 (Fed. Cir. 2007). Thus, the longstanding principles that Indian Tribes have an interest in river beds and associated natural resources within their territory, and that litigation affecting that interest cannot proceed in the tribe's absence, are undisturbed. *See Davis*, 192 F.3d at 957.

The application of these principles to this case is clear. Any adjudication of the claims in this case could impair or impede the Cherokee Nation's rights for several reasons. *First*, the Cherokee Nation, *not* the State, has the right to decide whether to assert claims for injunctive

relief or compensation based on alleged damages to natural resources within the IRW. And the Cherokee Nation, *not* the State, has the right to determine whether and how to resolve any such claims. It is obvious from this litigation that not all parties agree with the State's assertions about the proper role of organic fertilizer in the economy and environment. The State cannot arrogate unto itself the power to assert the claims of others and to decide how the lands and natural resources of other sovereigns will be managed. "[A]uthority over tribal property in Indian country exists exclusive of the states, and Indian water rights are generally paramount to rights perfected under state systems." *Indian Reserved Water Rights*, 33 Tulsa L.J. at 980-81 (collecting authorities). The Cherokee Nation, *not* the state, has the right to determine how to manage its resources, and any attempt by the State to litigate purported injuries to tribal lands and riverbeds constitutes an injury to tribal authority and sovereignty because "the Tribe has an interest in *its* laws, ordinance and procedures…." *Davis*, 192 F.3d at 958.

The State has no basis to apply its nuisance, trespass, environmental or agricultural laws to the lands and natural resources belonging to Indian tribes without congressional approval. *See Kennerly v. District Court*, 400 U.S. 423 (1971); *Williams v. Lee*, 358 U.S. 217 (1959). Indeed, the right to manage its natural resources was one of the fundamental benefits the Cherokee Nation obtained from its treaties with the United States. *See* Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, art. 5 (reassuring the Cherokee that no state or territory will regulate their lands, but the Cherokee Nation shall have "the right … to make and carry into effect all such laws as they may deem necessary" to manage their new lands). As the Supreme Court has stated, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olsen*, 324 U.S. 786, 789 (1945). The property of the Cherokee Nation is not subject to the control of Oklahoma, but rather "is withdrawn from the operation of

State laws." *The Kansas Indians*, 72 U.S. 737, 755-77 (1867); *see also* Cohen, *supra*, § 6.01[1], [4] (noting that state laws can only have effect in Indian Country "when Indians or their property are not substantially affected"). Accordingly, unless and until clear title to the lands and waters of the IRW is resolved, the State's claims in this lawsuit constitute an attempt to supplant tribal authority over their own lands and natural resources.

Second, resolution of the State's claims requires this Court to determine that Oklahoma, in fact, owns or holds in trust the relevant lands and natural resources. As discussed below, such a determination is essential to the exercise of this Court's Article III power. Unless a plaintiff has standing over the property in question, a federal court lacks jurisdiction over that plaintiff's claims. The State recognizes this fundamental principle, and therefore alleges in its Complaint that it has title and trusteeship over the lands and other natural resources in question. *See, e.g.*, SAC ¶ 5, 78, 84-85.

Clearly the resolution of this threshold question affects the Cherokee Nation's interests. For this litigation to proceed, the Court must satisfy itself that the State, not the Cherokee Nation, has title to the lands, waters, and natural resources of the IRW. Yet the Cherokee Nation has held and asserted exclusive title and control over those resources since before Oklahoma existed.

2. Defendants Face the Risk of Multiple or Otherwise Inconsistent Obligations

Aside from the impacts of this lawsuit on the Cherokee Nation, joinder of the Nation is necessary under Rule 19 because any resolution of this lawsuit in the Nation's absence would subject Defendants to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest." Fed. R. Civ. P 19(a)(2)(ii). Because the Cherokee Nation and its members are not parties to this litigation, *res judicata* and collateral estoppel may not protect Defendants from subsequent litigation involving the same nucleus of facts over the Tribe's potentially overlapping, or exclusive, interests. The risk of such multiple

or inconsistent obligations is, by itself, sufficient to require joinder. *See Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 877 (10th Cir. 1981) ("There need only be substantial risk and not certainty that" multiple and inconsistent obligations might "come to pass"); *Window Glass Cutters League of Am. v. American St. Gobain Corp.*, 428 F.2d 353, 354-55 (3d Cir. 1970).

B. Joinder of the Cherokee Nation is Not Feasible

Although the Cherokee Nation is a required party in this case, it cannot be joined without its consent. *Davis*, 343 F.3d at 1288. It is well-settled that Indian Tribes are "distinct, independent political communities," *Worcester*, 31 U.S. at 559, that "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 509 (1991); Cohen, *supra*, § 6.01. Accordingly, absent express congressional abrogation or tribal waiver, the Nation has absolute immunity from suit. *C & L Enterprises v. Citizen Bank Potawatomi Tribe of Okla.*, 532 U.S. 411, 416-18 (2001); *California v. Cabazon Band of Mission Indians*, 480 U.S. at 207; *Jicarilla Apache Tribe*, 455 U.S. at 147; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Here, there has been no waiver, nor has Congress abrogated the Cherokee Nation's immunity. Although clearly an interested party to this litigation, principles of sovereign immunity prevent the Nation from being joined absent its consent. Plaintiffs elected not to attempt to join the Cherokee Nation. Whether the Nation would have consented to such joinder had Plaintiffs sought its consent is not known. But what is known is that the Cherokee Nation has not been joined and this Court lacks the authority to order Plaintiffs to join the Nation absent a waiver of its immunity from suit. *Vann v. Kempthorne*, 534 F.3d 741, 746-48 (D.C. Cir 2008).

C. Dismissal is Required Under Rule 19(b)

If a required party cannot be joined (which is the case here), the Court must next determine "whether in equity and good conscience the action should proceed among the parties

before it, or should be dismissed." *Davis*, 343 F.3d at 1289 (quoting Fed. R. Civ. P. 19(b)); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968). Rule 19(b) provides four factors to guide this decision:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

The question whether a case should be dismissed under Rule 19(b) is approached "in a practical and equitable manner." *Davis*, 343 F.3d at 1289 (internal quotation marks omitted).

These factors overwhelmingly support a dismissal in this case. Indeed, the Tenth Circuit has stated that "[w]hen … a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989) (internal quotations omitted); *Citizen Potawatomi Nation*, 248 F.3d at 1001 ("We have noted the 'strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity.'") (quoting *Davis*, 192 F.3d at 960)); *United Keetoowah Band*, 67 Fed. Cl. at 702-04 ("courts have noted that 'when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor'" (quoting *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499)). Dismissal under such circumstances "is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign

immunity outweighs the … [Plaintiffs'] interest in litigation … [of their] claims." *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002). The Supreme Court has recently reaffirmed this principle, noting that allowing a lawsuit that affects the rights of a sovereign to continue in that sovereign's absence undermines the principles of mutual respect and cooperation among sovereigns that led to the creation of the doctrine of sovereign immunity. *Republic of Philippines v. Pimentel*, 128 S.Ct. 2180, 2189-92 (2008) (stating that principles of sovereign immunity are "much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection."). Accordingly, the Supreme Court has held that "[a] case may not proceed when a required-entity sovereign is not amenable to suit.… [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 2191.

These principles apply directly to this case. The Cherokee Nation's claims are far from frivolous. Accordingly, this case should be dismissed if the Cherokee Nation is not joined.

Moreover, for reasons already addressed, the present and absent parties face overwhelming prejudice should this action proceed. The merits of the Cherokee Nation's claims to the natural resources in the IRW must be adjudicated if the case goes forward because Defendants assert that the State lacks standing in light of the Nation's interests. Resolution of those claims would occur without the Nation's participation, which is the consummate example of prejudice. *See United Keetoowah Band*, 67 Fed. Cl. at 699-701. Equally significant, the Cherokee Nation will be harmed because decisions about how to manage lands and waters which its owns or holds in trust will be adjudicated by others and any monies awarded for the alleged

damages to those natural resources paid to the State rather than to the Nation. In the process, the State will seek to apply its own laws to Cherokee property. The *in abstentia* application of Oklahoma's comprehensive environmental and agriculture regulatory regime to tribal property would be an affront to the Cherokee Nation's dignity and "could pose an immediate and serious danger to the Cherokee Nation's ability to exercise sovereignty over these lands." *Id*. at 703.

These dangers cannot, as a matter of law, be minimized by reasoning that the Cherokee Nation could intervene to protect tribal interests. Rather, the potential for voluntary intervention is not a factor in the Rule 19 analysis. *Confederated Tribes*, 928 F.2d at 1500 (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990), for the proposition that "the ability to intervene . . . is not a factor that lessens prejudice")).

Moreover, because the Cherokee Nation would likely not be bound by principles of collateral estoppel, Defendants also face prejudice in the potential for multiple and inconsistent judgments. This factor alone is sufficient to require dismissal. *See Davis*, 343 F.3d at 1292; *Jicarilla Apache Tribe*, 821 F.2d at 540; *Citizen Potawatomi Nation*, 248 F.3d at 998; *Enterprise Management Consultants*, 883 F.2d at 893.

As in *Pimentel*, there are no alternative fora available where the Cherokee Nation could be compelled to participate, thereby lessening the prejudice created in this case. The State claims that it is the owner or trustee of the IRW's natural resources. Regardless of how or where that claim is adjudicated, it will necessarily involve a determination of whether the Cherokee Nation's conflicting claim is valid. *See Pimentel*, 128 S.Ct. at 2192.

For these reasons, the relief available from this Court cannot be deemed "adequate" in the absence of the Cherokee Nation. This "factor is not intended to address the adequacy of the judgment from plaintiff's point of view. Rather, the factor is intended to address the adequacy of

the dispute's resolution." *Davis*, 343 F.3d at 1292-93 (citation omitted). Because Plaintiffs' claims involve allegations of natural resource ownership, resolving those claims without the Cherokee Nation will clearly not be adequate for either the Tribe or Defendants. *See Pimentel*, 128 S.Ct. at 2193 (finding a remedy inadequate under Rule 19B0 where a sovereign absent party had potentially conflicting claims and would not be bound by the judgment).

The fact that Plaintiffs may desire to proceed is insufficient to support a finding of adequacy. *See American Greyhound*, 305 F.3d at 1025 (relief is not adequate where the plaintiffs "achieved what they sought but the tribes' protectible interests are impaired"). Accordingly, the Court's resolution of this dispute will not afford the "complete, consistent, and efficient settlement of controversies" necessary to proceed. *Davis*, 343 F.3d at 1293 (internal quotations omitted).

In sum, the Rule 19(b) factors overwhelmingly support dismissal.

D. In the Alternative, the Court Should Reject the State's Claims as a Matter of Law Based on Lack of Standing

For Rule 19, it is sufficient that the Cherokee Nation asserts a non-frivolous claim to the IRW's natural resources. *Pimentel*, 128 S.Ct. at 2189-91; *Davis*, 192 F.3d at 958-59. The Court need not decide the merits of the Nation's claim to dismiss this case. *Id.* However, if this case proceeds (whether with or without the Cherokee Nation), the Court must address whether Plaintiffs lack standing because they do not own or hold in trust the natural resources at issue.

The federal courts "have always insisted on strict compliance with th[e] jurisdictional standing requirement." *Raines v. Byrd*, 521 U. S. 811, 819 (1997). For its claims to be justiciable in federal court, a plaintiff must establish "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish Article III standing, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected

interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* Plaintiffs bear the burden of demonstrating that each of their claims seeks to recover for an injury to their own legally protected interests and not the interests of another. *Id.* A plaintiff does not have standing to assert a claim of injury to property that it does not own or hold in trust. *See, e.g., Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006); *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 848 (9th Cir. 2001).

If the case is to proceed, Plaintiffs bear the burden of proving that they have standing to assert a claim for injury to each of the lands and natural resources at issue. *E.g., Lujan*, 504 U.S. at 560-61. Without an ownership or trusteeship interest over the natural resources at issue, Plaintiffs could not have suffered an injury from the alleged contamination of the IRW and therefore lack standing. *See id.*; *Tal*, 453 F.3d at 1254; *Washington Legal Found.*, 271 F.3d at 848. Plaintiffs must assert their own rights as owners or trustees of the IRW's natural resources; they may not assert the rights of the Cherokee Nation or others. *Steel Co. v. Citizens for Better Environ.*, 523 U. S. 83, 102–103 & n.5 (1998); *Larson v. Valente*, 456 U.S. 228, 244, n. 15 (1982) (a plaintiff must show that a favorable decision "will relieve a discrete injury to himself" and not another); *Warth v. Seldin*, 422 U. S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party").

Accordingly, the Court cannot adjudicate Plaintiffs' claims without first determining whether Plaintiffs are the proper owners or trustees of the IRW's natural resources, to the exclusion of Indian Tribes. For the foregoing reasons, it is clear that they are not.

CONCLUSION

Defendants respectfully request that this Court dismiss Plaintiffs' complaint with prejudice, and grant Defendants such other relief as this Court deems just and equitable.

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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